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No. 96-827

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LEONARD ROLLON CRAWFORD-EL,
Petitioner,

v.

PATRICIA BRITTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF J. MICHAEL QUINLAN AND LOYE W. MILLER, JR. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

MICHAEL L. MARTINEZ
Counsel of Record
HOLLAND & KNIGHT LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Attorney for J. Michael Quinlan and Loye W. Miller, Jr.

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INTEREST OF *AMICI CURIAE* *

Amici curiae J. Michael Quinlan and Loye W. Miller, Jr. are former federal officials who are also defendants in a long-running and much publicized *Bivens* [1] action with which this Court is familiar.[2] Quinlan is the former Direc-

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* No counsel for any party had any role in authoring this brief, and no person other than the named amici and their counsel made any monetary contribution to its preparation and submission.

[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Counsel for both petitioner and respondent have consented to the filing of this Brief, and amici have filed with the Clerk of Court, pursuant to Sup. Ct. R. 37.3(a), letters stating such consent.

tor of the Federal Bureau of Prisons ("BOP") and Miller is the former Director of Public Affairs for the United States Department of Justice. Both are *Bivens* defendants alleged to have acted with an improper motive in violation of the First Amendment rights of a federal inmate. *See Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), *rehearing and rehearing in banc denied*, 17 F.3d 1525 (D.C. Cir. 1994), *vacated on other grounds*, 515 U.S. 321 (1995).

The principal issue in *Kimberlin*, as in this case, is whether a "heightened pleading standard" applies when a plaintiff sues a public official in a *Bivens* or 42 U.S.C. § 1983 action and alleges unconstitutional motive.[3] Nearly all of the appellate litigation in *Kimberlin* focused on whether a heightened pleading standard should apply in *Bivens* cases that turn on motive and, if so, what that standard should be. Quinlan and Miller have a strong interest in the issue before this Court as their case is presently pending in the United States District Court for the District of Columbia, awaiting a decision on their motion for summary judgment asserting qualified immunity. The manner by which this Court resolves the issues before it in this case will likely have a direct bearing on the outcome of the ongoing *Kimberlin* litigation. Indeed, amici Quinlan and Miller participated as amici in this case in the Court of Appeals and proposed the "clear and convincing evidence" test adopted by the majority of that court. *See Crawford-El v. Britton*, 93 F.3d 813, 852 n.9 (D.C. Cir. 1996) (en banc) (Edwards, CJ., dissent).

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[3] The dispute here is brought pursuant to 42 U.S.C. § 1983 rather than *Bivens*. The applicable principles of immunity law, and thus of any applicable heightened pleading standard, apply equally to both types of suits seeking damages from individual officials. *See Butz v. Economou*, 438 U.S. 478, 504 (1978) ("we deem it untenable to draw a distinction for purposes of immunity law between" section 1983 actions and *Bivens* actions).

STATEMENT

Petitioner Leonard Rollon Crawford-El, is a District of Columbia inmate serving a life sentence for murder. He alleges in his Fourth Amended Complaint, *inter alia*, that respondent Patricia Britton, a District of Columbia corrections officer, took certain actions with respect to petitioner in retaliation for the previous exercise by petitioner of his First Amendment rights. Essentially petitioner claims that respondent retaliated against him by having certain personal items sent to petitioner's brother-in-law rather than to petitioner himself when petitioner was transferred from one correctional facility to another. According to petitioner, respondent allegedly took this action in retaliation for petitioner having exercised his First Amendment rights by speaking with the press. Petitioner also alleges a denial by respondent of his First Amendment right of access to the courts. *Crawford-El v. Britton*, 93 F.3d at 815.

Following the district court's dismissal of petitioner's Fourth Amended Complaint, the Court of Appeals reviewed the case *en banc* on its own motion to determine the standard of pleading or proof necessary for plaintiff to withstand dismissal on qualified immunity grounds where the plaintiff alleges unconstitutional motive. The *en banc* court issued a decision with four separate majority opinions and one dissenting opinion. A majority of the court decided to jettison what had been the rule in the District of Columbia Circuit, that a plaintiff must produce "direct evidence" of improper motive to withstand an assertion of qualified immunity. In its place, the Court fashioned a test that requires a

> *Bivens* plaintiff who seeks damages from a government official for a constitutional tort must prove the unconstitutional motive (where that is an element of the tort) *by clear and convincing evidence*.

93 F.3d at 838 (Ginsburg, J., concurring) (emphasis supplied). *See also*, 93 F.2d at 821-24 (Williams, J.). This

standard applies "equivalently at summary judgment and trial, as a seamless web." *Id.* at 823. As Judge Ginsburg further explained:

> a plaintiff will feel the weight of this burden not only at trial but also in opposing a motion for summary judgment; in both contexts the plaintiff will have to present evidence that a jury could consider clear and convincing proof of the defendant's unconstitutional motive.

Id. at 838-39.[4] Thus, in the District of Columbia Circuit, in order to survive a dispositive motion in a motive-based *Bivens* case in which qualified immunity is asserted as an affirmative defense, the *Bivens* plaintiff must present "clear and convincing" evidence of that motive.

The Court of Appeals has defined "clear and convincing" evidence in other contexts as "generally requir[ing] the trier of fact, in viewing each party's pile of evidence, to reach a firm conviction of the truth on the evidence about which he or she is certain." *United States v. Montague*, 40 F.3d 1251, 1255 (D.C. Cir. 1994). Likewise, the Court of Appeals has noted that *Black's Law Dictionary* defines "clear and convincing" proof as "proof which results in reasonable certainty of truth." *Id.*, citing *Black's Law Dictionary* 251 (6th ed. 1990). *See also Clifford S. Fishman, Jones on Evidence: Civil and Criminal* § 3:10 (7th ed. 1992) (clear and convincing evidence is "a firm belief or conviction" that the allegations at issue are true).

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[4] Six judges concurred in the "clear and convincing" evidence standard and five judges dissented. Judge Ginsburg's concurring opinion is the controlling opinion in *Crawford-El* even though Judge Williams wrote the primary opinion for the majority. Although separate concurring opinions were authored by Judges Silberman, Ginsburg and Henderson, Judge Ginsburg's opinion is the most restrictive of the majority opinions. Judges Buckley and Sentelle apparently joined in Judge Williams' opinion since his opinion is identified as the "opinion for the Court" and they did not join in the dissenting opinion authored by Chief Judge Edwards and joined by Judges Wald, Randolph, Rogers and Tatel.

SUMMARY OF ARGUMENT

This Court should hold that a heightened pleading standard applies in *Bivens* and section 1983 cases where the plaintiff alleges an unconstitutional motive on the part of the defendant. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court adopted a wholly objective test to assess a government official's entitlement to qualified immunity. The test seeks to accommodate a damages remedy under the constitution with minimizing the heavy social costs such litigation necessarily imposes on individually sued government officials. Application of *Harlow's* objective test is problematic, however, when unconstitutional motive is an element of a plaintiff's claim, because the question of motive is wholly subjective.

Generally the courts of appeals have addressed the problem by applying a "heightened pleading standard" to *Bivens* and section 1983 actions. Heightened pleading standards are impelled by: (i) the expansive language in *Harlow* and its progeny emphasizing objectivity; (ii) this Court's admonition that courts determine entitlement to qualified immunity at the earliest possible stage of litigation; and (iii) the need to protect officials from "insubstantial suits." The substantive policy concerns undergirding immunity justify the direct evidence standard and give substance to the promise that qualified immunity is an "immunity from suit." A heightened pleading standard in this context is not precluded by the Court's precedents or by the Federal Rules of Civil Procedure. Rather, the substantive right of immunity overrides the application of any procedural rule.

The Court should adopt the "clear and convincing evidence" heightened pleading standard adopted by the District of Columbia Circuit in this case. It is a standard that is easily understood, has a substantial body of case law from other contexts and would best serve the competing interests in motive-based cases that *Harlow* sought to address and objectify in the qualified immunity setting.

ARGUMENT

I. A HEIGHTENED PLEADING STANDARD IS NECESSARY TO MAKE QUALIFIED IMMUNITY MEANINGFUL IN CASES WHERE UNCONSTITUTIONAL MOTIVE IS ALLEGED.

This Court should hold that a heightened pleading standard [5] applies in constitutional tort and section 1983 cases where, as here, a plaintiff alleges an improper or unconstitutional motive on the part of an individually sued public official. There is a critical and important need for such a requirement. Otherwise, as the Sixth Circuit has observed, "[t]he promise of early exit from a lawsuit offered by qualified immunity is an empty promise." *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995). Indeed, Justice Kennedy has observed, we believe correctly, that "the heightened pleading requirement is the most workable means to resolve" constitutional tort cases in which the plaintiff alleges improper motive and the defendant asserts an entitlement to qualified immunity. *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy J., concurring).

The recurring problem for the lower courts is based in the tension between the two countervailing interests this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), sought to reconcile: providing a damages remedy to vindicate constitutional guarantees and minimizing the heavy social costs imposed by litigation against public officials in their individual capacities. *Harlow*, 457 U.S. at 814 citing *Butz v. Economou*, 438 U.S. 478, 506 (1978) and *Bivens*, 403 U.S. at 410. Qualified immunity "strikes a balance between compensating those who have been injured by official conduct and protecting government's abil-

[5] The term "heightened pleading standard" has been criticized as a misnomer and that it should more properly be characterized as a "heightened production standard." *Crawford-El*, 93 F.3d at 823. Nonetheless, for ease of reference we refer throughout to the "heightened pleading standard."

ity to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

In *Harlow*, this Court "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). The Court abandoned the then-existing two-part test composed of objective and subjective factors in favor of a wholly objective approach. The Court explained that the subjective, good faith element of qualified immunity "frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." *Harlow*, 457 U.S. at 815-16; *Behrens v. Pelletier*, 116 S. Ct. 834, 838 (1996). Thus, after *Harlow*, government officials are entitled to qualified immunity so long as their conduct is "objectively reasonable" and does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

This Court has reiterated the objective approach to qualified immunity in the years subsequent to *Harlow*. *See Davis v. Scherer*, 468 U.S. 183, 191 (1984) ("[w]hether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' *No other 'circumstances' are relevant to the issue of qualified immunity.*") (emphasis added) (citation omitted); *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (*Harlow* "purged qualified immunity of its subjective components"); *Anderson v. Creighton*, 483 U.S. at 641 (examination of the reasonableness of a warrantless search "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize"). Nevertheless, in the fifteen years since *Harlow* was decided, the lower courts have grappled with how to apply *Harlow's* wholly objective approach to cases where the question of motive is critical to the alleged constitutional violation.

Although their formulations have differed, the courts of appeals have almost uniformly adopted some form of heightened pleading standard to address what Judge Easterbrook has termed the "conundrum" presented by the *Harlow* formulation in unconstitutional motive cases. *Elliott v. Thomas*, 937 F.2d 338, 344 (7th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992). *See e.g. Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995) (court requires "particularized evidence" demonstrating "improper motive"); *Gooden v. Howard County, Md.*, 954 F.2d 960, 969-70 (4th Cir. 1992) (en banc) (court requires plaintiff to "plead specific facts in a nonconclusory fashion"); *Veney v. Hogan*, 70 F.3d at 922 (court requires "specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity."); *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991) (court requires "nonconclusory allegations of subjective motivation").

Clearly, therefore, the need for a heightened pleading standard in motive-based cases is impelled by: (i) the expansive language in *Harlow* and its progeny emphasizing objectivity; (ii) the Supreme Court's admonition that courts determine entitlement to qualified immunity at the earliest possible stage of litigation; and (iii) the need to protect officials from "insubstantial suits." Like other areas of the law where policy concerns limit the types of evidence that can be used or the inference that can be drawn from such evidence, the substantive policy concerns undergirding qualified immunity justify a heightened pleading standard. Heightened pleading standards are necessary to give substance to the promise that qualified immunity is an "immunity from suit" in cases where unconstitutional motive is alleged.

II. A HEIGHTENED PLEADING STANDARD IS NOT BARRED BY THE COURT'S DECISION IN *LEATHERMAN* OR BY THE FEDERAL RULES OF CIVIL PROCEDURE.

The need for a heightened pleading standard in cases where unconstitutional motive is alleged is not undermined by this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), or by the Federal Rules of Civil Procedure. In *Leatherman*, the Court held that there is no justification for a heightened pleading requirement for claims against municipalities brought pursuant to section 1983. The Court, however, expressly cordoned off and declined to rule on the question of whether requiring heightened pleading as to individuals in qualified immunity cases is permissible. 507 U.S. at 166-67. Emphasizing that *Leatherman* involved a *municipal* defendant not entitled to immunity, the Court stated, "[w]e thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government defendants." *Id.*

Apart from the obvious, that *Leatherman* specifically refrained addressing the issue of heightened pleading in a qualified immunity context, the decision provides no basis for a conclusion that the Federal Rules of Civil Procedure foreclose heightened pleading standards in *Bivens* and § 1983 cases. Indeed, requiring heightened specificity in *Bivens* cases is consistent with both the emphasis in *Anderson v. Creighton* on the "particularized" manner in which the immunity inquiry is to be undertaken, 483 U.S. at 640, as well as with a "firm application" of Rule 8's mandate that a plaintiff demonstrate his or her entitlement to the relief sought. *Leatherman* did not alter those principles.

Moreover, qualified immunity is an affirmative defense, and thus, generally arises only when a defendant asserts it in a Rule 12 motion to dismiss, in a Rule 56 motion

for summary judgment or in an Answer. When such a motion or responsive pleading is filed, the defendant's *substantive right* to qualified immunity makes it incumbent upon the plaintiff, at a minimum, to respond with specific, concrete facts supporting the plaintiff's general averment of malice or improper motive. *See* Fed. R. Civ. P. 56(e) (requiring through affidavits and other evidence "specific facts showing there is no genuine issue for trial"). To conclude otherwise would abrogate the substantive immunity possessed by public officials that is intended to free them from the burdens of litigation.

Because qualified immunity is a substantive right, it trumps any federal procedural rule pursuant to the Rules Enabling Act, 28 U.S.C. § 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"). Thus, "[t]o the extent of any conflict, Rules 8 and 9(b) must yield to vindication of the defense of immunity," *Schultea v. Wood*, 47 F.3d 1427, 1436 (5th Cir. 1995) (en banc) (Jones, J. concurring). Indeed, as Judge Jones explained in her concurring opinion in *Schultea*,

> Despite a superficial relevance, *Leatherman* cannot faithfully be read to preclude—or even indict—the application of a heightened pleading requirement in actions against individual government officials.

Id. at 1435.

That conclusion is consistent with Justice Kennedy's concurrence in *Siegert*, as well as with the opinions of several other courts of appeals decided subsequent to *Leatherman*. Justice Kennedy observed that "[t]he heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis." 500 U.S. at 235. He further noted that although heightened pleading "is a departure from the usual pleading requirements of" Rules 8 and 9(b) of the Federal Rules of Civil Procedure,

> avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Id.[6]

More recently, the courts of appeals that have considered whether a heightened pleading standard properly can be required in the wake of *Leatherman*, have adhered to the view that *Leatherman* did not alter the analysis for establishing a heightened pleading requirement in the first place. *See Branch v. Tunnell*, 14 F.3d 449, 455-57 (9th Cir.), *cert. denied*, 512 U.S. 1219 (1994); *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995); *Veney v. Hogan*, 70 F.3d at 921-22; *Schultea v. Wood*, 47 F.3d at 1433; *Jordan by Jordan v. Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994). As the Sixth Circuit explained in *Veney*, a "failure to impose" a heightened pleading standard in these cases

> would eviscerate the substantive rights afforded by the qualified immunity defense. The promise of early exit from a lawsuit offered by qualified immunity is an empty promise if plaintiffs are routinely permitted to survive a motion to dismiss with mere "notice" pleading.

70 F.3d at 922.

Accordingly, there is no merit to a contention that *Leatherman* or the Federal Rules foreclose heightened pleading requirements in the qualified immunity arena. The Court not only may impose such a requirement, it manifestly *should* impose such a requirement to ensure

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[6] As Judge Jones also observed in *Schultea*, the three justices who dissented in *Siegert* (justices Marshall, Blackmun and Stevens) each "recognized the necessity for some form of heightened pleading in qualified immunity cases . . . Accordingly, four justices endorsed a heightened standard in qualified immunity and none disagreed." 47 F.3d at 1436.

that the important policies undergirding qualified immunity are, in fact, realized.

III. THE COURT SHOULD ADOPT THE DISTRICT OF COLUMBIA CIRCUIT'S "CLEAR AND CONVINCING EVIDENCE" HEIGHTENED PLEADING STANDARD.

Once the Court decides to impose a heightened pleading standard the task remains to determine what standard it should apply. The Court should adopt the "clear and convincing evidence" standard adopted by the District of Columbia Circuit in this case. As Judge Williams has noted, the array of options for resolving motive-based *Bivens* claims spans the spectrum "from officials' full exposure to conventional discovery, to withdrawal of *Bivens* liability for constitutional torts involving subjective intent." *Kimberlin v. Quinlan*, 17 F.3d at 1525 (Williams, J. concurring in the denial of rehearing *in banc*), *vacated, on other grounds*, 515 U.S. 321 (1995). The height at which the bar is set depends upon "the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money." *Id.* at 1525-26.

As articulated by the District of Columbia Circuit, the application of a clear and convincing evidence heightened pleading standard is easily understood, has a substantial body of case law from other contexts and will best serve the qualified immunity goals and analysis set forth in *Harlow*. Under this approach, a plaintiff alleging improper motive, upon receiving either a motion to dismiss or for summary judgment asserting qualified immunity, would be required to support the motive-based claims in his or her complaint with clear and convincing evidence that demonstrates unconstitutional motive. Application of this standard would permit a plaintiff to rely on all available evidence in support of his or her claim (whether

direct or circumstantial) without thereby subjecting the defendant official to the burdens of litigation any time that a plaintiff can assemble weak facts and circumstances that *might* persuade a jury by a preponderance of the evidence that the defendant acted with an unlawful motive.

The clear and convincing evidence standard, as applied in this context, would thus work much as it does in the defamation and many other settings. An evaluation of summary judgment in an immunity context would, as with a defamation claim, require a court to "view the evidence submitted through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby*, 477 U.S. 242, 254 (1986). Therefore, unless a plaintiff could respond to an official's claim to qualified immunity with evidence of a sufficient "caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence, the defendant official should be accorded immunity. *Id.*

The application of a "clear and convincing" standard is supported by the venerable principle that government officials are presumed to act in good faith absent proof to the contrary. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (the "presumption of regularity . . . supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties"). Thus, for example, when relief is sought directly from the government based upon an alleged bias or impermissible motive on the part of the government official, the lower courts have erected a high barrier to shield the government from unsubstantiated bias claims. Because there is a strong presumption that government officials act in good faith, the courts have held in those contexts that a plaintiff alleging bad faith must come forward with "well-nigh irrefragable proof to overcome the presumption of good faith." *Torncello v. United*

States, 681 F.2d 756, 770 (Ct. Cl. 1982); *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993).

Moreover, clear and convincing evidence is a well-known standard with a well-developed body of caselaw. It is easily understood and has been employed by the courts in a variety of contexts where public policy justifies requiring a plaintiff to support his claims with strong evidence. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 282 (1990). For example, recognizing that fraud is simple to allege and is ordinarily a question for a jury, the courts commonly require clear and convincing evidence of fraud to support a tort action. *Woodby v. INS*, 385 U.S. 276, 285, n.18 (1966). Clear and convincing evidence of improper motive is also required in libel cases involving public figures, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991), as well as to prove oral contracts, and in deportation, denaturalization and civil commitment proceedings. *Cruzan*, 497 U.S. at 282 (citing cases).

As explained in *Cruzan*, this Court has mandated clear and convincing evidence as a standard of proof where the interests at stake are important and involve more than a mere loss of money. 497 U.S. at 282. The purposes of qualified immunity and the particular dangers of permitting an inquiry into an official's motive,[7] constitute "particularly important" interests that justify the application of a clear and convincing standard where improper motive is alleged in the *Bivens* context.

The clear and convincing evidence standard is also most faithful of any of the tests adopted by the courts of appeals to the concerns undergirding the qualified immunity doctrine. Likewise, it is a test less susceptible

[7] *See United States* v. *Morgan*, 313 U.S. 409, 422 (1941) (Frankfurter, J.) (recognizing that probing the mental processes of the Secretary of Agriculture would be "destructive" to the integrity of the administrative process).

both to abuse by plaintiffs and to errors by the district court. Thus, the Court should adopt clear and convincing evidence as the heightened pleading standard applicable to analyze entitlement to qualified immunity when unconstitutional motive is alleged. Any lesser protection will impose "on officials the very costs and burdens . . . that *Harlow* intended to spare them." *Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL L. MARTINEZ
Counsel of Record
HOLLAND & KNIGHT LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Attorney for J. Michael Quinlan and Loye W. Miller, Jr.

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